

December 21, 2011

Brian T. Hildreth
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Sacramento, CA 95814

Re: Your Request for Advice
Our File No. A-11-203

Dear Mr. Hildreth:

This letter responds to your request for advice on behalf of Dan Leavitt, Deputy Director of the California High Speed Rail Authority (“CHSRA”) regarding the post-governmental employment restrictions (“revolving door”) provisions of the Political Reform Act (the “Act”).¹

Please note that our advice is based solely on the Act. We therefore offer no opinion on the application, if any, of other post-government employment laws or on any incompatible activities restrictions his agency may impose. We also offer no advice on the application, if any, of Government Code Section 1090.

Additionally, this letter should not be construed as advice on any conduct that may have already taken place. This letter is based on the facts presented. The Fair Political Practices Commission (“Commission”) does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71; Section 83114.)

QUESTION

Do the post-governmental employment provisions of the Act prohibit Mr. Leavitt, who will be acting as a paid consultant for the San Joaquin Regional Rail Commission, (“SJRRC”) from appearing before or communicating with the California High Speed Rail Authority (“CHSRA”) regarding projects that he was involved with while employed by the CHSRA?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

CONCLUSION

Mr. Leavitt may work as a paid consultant for SJRRC after resigning from his current position with CHSRA. However, he is prohibited by the one-year ban from making certain appearances before his former agency and by the permanent ban from representing SJRRC on any proceeding in which he participated while working for CHSRA, as outlined below.

FACTS

Your firm represents Mr. Dan Leavitt, Deputy Director of CHSRA. You are requesting formal advice regarding whether Mr. Leavitt may engage the SJRRC as a consultant.

Mr. Leavitt is currently the Deputy Director of CHSRA and has held this position since 1997. He intends on resigning his position in the near future and wishes to provide services to the SJRRC as a consultant.

In his capacity as Deputy Director, Mr. Leavitt is generally responsible for planning and environmental issues. In your December 7, 2011 letter you state that Mr. Leavitt is “working in multiple capacities until the Authority is able to hire additional high-level staff.” His official title is “Deputy Directory Environmental, and Planning,” although he has also been acting as the Regional Director for most of Northern California and until recently was also overseeing much of the CHSRA’s work in Southern California. As part of his duties, Mr. Leavitt leads the various consulting teams that CHSRA has under contract (including a program management team and regional teams that are responsible for the environmental documents/engineering).

As Environmental Director, Mr. Leavitt is responsible for overseeing the various program and project-level environmental processes. He signs off on notifications that initiate environmental processes, oversees alternative analysis, technical reports, development and review of administrative draft EIR/EIS documents, and the development and review of the final EIR/EIS and certification documents that are to be approved by the CHSRA board. Before any of the environmental documents are released to the public, they must be reviewed and approved by Mr. Leavitt.

The CHSRA currently has 10 projects in the environmental impact report/environmental impact statement (“EIR/EIS”) process that cover close to 900 miles of rail. The 10 EIR/EIS projects are: Sacramento-Merced, San Francisco-San Jose, San Jose-Merced, Merced-Fresno, Fresno-Bakersfield, Bakersfield-Palmdale, Palmdale-Los Angeles, Los Angeles-Orange County, Los Angeles to San Diego (via the Inland Empire) and the Altamont Corridor Rail Project.

Each of these environmental processes is at different stages of development. The work is being staggered. The Merced-Fresno and Fresno-Bakersfield sections are the furthest along. Most of Mr. Leavitt’s time is now spent overseeing these environmental processes. The Merced-Fresno and Fresno-Bakersfield sections are where CHSRA will start construction on the HST system and where CHSRA has secured over \$3 billion in federal construction funds.

Mr. Leavitt works directly with the project management team's environmental lead, but also works directly with the regional teams. He plays a lead role in coordination with other state and federal agencies, including the Federal Railroad Administration, which is the lead federal agency, and the Attorney General's Office, which is CHSRA's legal counsel and California Environmental Quality Act ("CEQA") expert for the environmental work.

As Regional Director, Mr. Leavitt works closely with the project management team's regional directors, who are responsible for managing the regional teams. He coordinates with local and regional agencies (including SJRRC); conducts presentations; reviews work product; represents CHSRA before the public; keeps CHSRA's CEO informed and provides overall direction for the work in these sections. He currently spends most of his time as Environmental Director, and probably less than 10% of his time on the Altamont Corridor Rail Project, Sacramento-Merced, and San Jose to Merced sections.

As Planning Director, Mr. Leavitt developed CHSRA's station area development policies and has led CHSRA's other sustainability programs such as CHSRA's renewable energy policy, sustainability MOU with federal agencies, UC Berkeley station area grant, urban design guidelines and the "Vision California" study effort. Mr. Leavitt has also "led initiation" of CHSRA's station area development agreement program, which is helping fulfill CHSRA's commitment to fund transit oriented development studies for seven of the cities that will have high speed train ("HST") stations.

Neither Mr. Leavitt nor anyone else at CHSRA has been involved in approving clean up plans or granting permits. Mr. Leavitt advises on policies (such as the station area development policies and the renewable energy policy). He has not yet been involved in working on any regulations.

There are a number of duties and projects Mr. Leavitt may work on for SJRRC. In general, his duties would focus on assisting the SJRRC Executive Director with planning improvements (both short-term and long-term conventional improvements) for the existing "conventional commuter rail" Altamont Commuter Express ("ACE") service and coordination with other agencies, elected officials, and the public. The work would not be directly related to CHSRA's proposed HST system. The work with SJRRC could include:

- Assisting SJRRC staff in planning and implementing the expansion of the conventional non-electric commuter ACE service between Stockton and San Jose.
- Planning potential future conventional rail expansions of ACE service to Sacramento, Merced, and potentially as far south as Bakersfield utilizing existing freight rail tracks.
- Planning and agency coordination for potential extensions of ACE service to Union City (Bay Area Rapid Transit "BART" connection) and to San Francisco via the Caltrain corridor.

- Coordination with local and regional agencies and elected officials throughout the Central Valley, Bay Area, and Southern California to support improved regional rail services.
- Develop reports to assist in helping the SJRRC determine if it should join in the legislation being developed in Southern California to expand regional control and management of existing state-supported conventional rail services.

The work on conventional ACE improvements would include writing reports and planning documents, and working with other agencies, elected officials, and the public.

If there is no conflict, the SJRRC has also indicated that it also would like Mr. Leavitt to participate in CHSRA's project-level environmental HST work for to the Sacramento-Merced section and the Altamont Corridor Rail Project. Duties there likely would include review and comment on all new draft documents developed, meeting with cities, organizations, and the public, making presentations and participating in various working group meetings such as the Altamont Corridor Working Group and the Sacramento-Merced working group. Mr. Leavitt would provide input to CHSRA's regional consulting team and the regional manager to help progress the work. This would free up more time for existing SJRRC core staff to focus on other duties.

ANALYSIS

Post-Governmental Employment Restrictions

Public officials who leave state service are subject to two types of post-governmental employment provisions under the Act, colloquially known as the "revolving door" prohibitions. In addition, Section 87407 prohibits certain state and local officials from making, participating in making, or using their official position to influence decisions affecting persons with whom they are negotiating employment, or have any arrangement concerning employment. (Section 87407; Regulation 18747.)

- **One Year Ban:** This ban prohibits a public official from appearing for compensation before his or her former agency, or officer or employee thereof, for the purpose of influencing any administrative, legislative or other specified action (including contracts);
- **Permanent Ban:** This ban prohibits a former state administrative official from advising or representing any person, other than the State of California, for compensation in any judicial, quasi-judicial or other proceeding in which the official participated while in state service. (See Sections 87401-87402, Regulation 18741.1);
- **Restrictions on Negotiating Prospective Employment:** This prohibition restricts public officials from negotiating or making any arrangement concerning prospective employment (Section 87407, Regulation 18747).

The One-Year Ban

Section 87406 of the Act prohibits a state employee from communicating, for compensation, with his or her former agency for the purpose of influencing certain administrative or legislative action or influencing certain proceedings. (Section 87406, Regulation 18746.1.)

The one-year ban applies to employees who are designated in their former agency's conflict of interest code. However, the one-year ban also applies to employees who made or participated in the making of governmental decisions that had a reasonably foreseeable material effect on any financial interest. In other words, the one-year ban also applies to former employees who should have been designated in their former employer's code. (Section 87406(d)(1); Regulation 18746.1(a)(2).)

A state employee "makes a governmental decision" when acting within the scope of his or her authority, he or she: 1) votes on a matter; 2) appoints a person; 3) obligates his or her agency to any course of action; 4) enters into any contractual agreement on behalf of his or her agency; or 5) determines not to act, unless the determination is made due to a conflict of interest. (Regulation 18702.1.)

Additionally, a state employee "participates in making a governmental decision" when he or she negotiates (without significant substantive review) with a government entity or private person regarding a governmental decision, or when he or she advises or makes recommendations to the decisionmaker (either directly or without significant substantive review), by conducting research or an investigation or by presenting any report, analysis, or opinion, which requires the exercise of independent judgment on the part of the employee and the outcome or purpose of which is to influence the decision. (Regulation 18702.2.)

As Director of the CHSRA, Mr. Leavitt is a designated employee. He approved environmental documents and made recommendations on other items as part of CHSRA's oversight of the state's high speed rail program, thereby obligating CHSRA to a particular course of action. Therefore, for one year after leaving the CHSRA he may not communicate with his former agency in an attempt to influence any transaction involving legislative or administrative action² or other discretionary act – including contracts.

² For purposes of Section 87406, the Act defines "administrative action" and "legislative action" as the following: "'Administrative action' means the proposal, drafting, development, consideration, amendment, enactment, or defeat by any state agency of any rule, regulation, or other action in any ratemaking proceeding or any quasi-legislative proceeding" (Section 82002(a).)

"'Legislative action' means the drafting, introduction, consideration, modification, enactment or defeat of any bill, resolution, amendment, report, nomination or other matter by the Legislature or by either house or any committee, subcommittee, joint or select committee thereof, or by a member or employee of the Legislature acting in his official capacity. 'Legislative action' also means the action of the Governor in approving or vetoing any bill." (Section 82037.)

Communications Covered by the One-Year Ban

Not all communications to a former state administrative agency employer are prohibited by the one-year ban. The ban extends only to those communications for the purpose of influencing any legislative or administrative action, or influencing any discretionary act “involving the issuance, amendment, awarding, or revocation of a permit, license, grant or contract, or the sale or purchase of goods or property.” (Section 87406(d)(1); Regulation 18746.1(b)(5).)

Communications restricted by the one-year ban include any formal or informal appearance or oral or written communication made to influence legislative or administrative action or any action on a proceeding. (Section 87406(d)(1).) These communications include, but are not limited to, conversing directly or by telephone, corresponding by writing or e-mail, attending a meeting, and delivering or sending any communication. (Regulation 18746.2(a).) A communication is considered to be for the purpose of influencing legislative or administrative action “if it is made for the principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding.” (Regulation 18746.2(a).)

It is not considered a prohibited communication under the one-year ban, if an individual:

“(1) Participates as a panelist or formal speaker at a conference or similar public event for educational purposes or to disseminate research and the subject matter does not pertain to a specific action or proceeding;

“(2) Attends a general informational meeting, seminar, or similar event;

“(3) Requests information concerning any matter of public record; or

“(4) Communicates with the press.” (Regulation 18746.2(b)(1)-(4).)

Thus, the one-year ban would not prevent Mr. Leavitt from requesting information generally available to the public about agency business from CHSRA or other state agencies. Nor would it prohibit him from attending informational meetings of CHSRA or another state agency regarding existing laws, regulations, or policies, so long as he does not attempt to influence the agency’s legislative or administrative action.

Whether a particular meeting or conversation is for the purpose of influencing administrative or legislative action (as defined by Regulation 18746.2) depends on the facts of each case. For instance, if an ex-employee attends a public meeting with many other persons where there are many topics on the agenda, it may be reasonable to infer that the ex-employee’s attendance is not for the purpose of influencing the agency’s action. Conversely, where there is a small meeting to discuss a particular administrative or legislative action, or other specific action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property (Section 87406(d)), it may more

readily be inferred that the former employee's presence at the meeting is intended to influence agency action. (*Ramirez* Advice Letter, No. A-99-300.)

Also, appearances or communications before a former state agency employer, made as part of "services performed to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement may be excluded from the one-year prohibitions ... provided the services do not involve the issuance, amendment, awarding, or revocation of any of these actions or proceedings." (Regulation 18746.1(b)(5)(A); *Williams* Advice Letter, No. I-06-058 citing to *Quiring* Advice Letter, No. A-03-272 and *Hanan* Advice Letter, No. I-00-209.)

For instance, we have advised that a former agency official may draft proposals on a client's behalf to be submitted to the agency so long as the former employee is not identified in connection with the client's efforts to influence administrative action. (*Williams* Advice Letter, *supra*, citing to *Cook* Advice Letter, No. A-95-321 and *Harrison* Advice Letter, No. A-92-289.) Similarly, a former agency official may use his or her expertise to advise clients on the procedural requirements, plans, or policies of the official's former agency so long as the employee is not identified with the employer's efforts to influence the agency. (*Perry* Advice Letter, No. A-94-004.)

Provided that Mr. Leavitt's work on CHSRA projects or CHSRA-administered projects does not involve appearances or communications before his former agency or it falls within the exception of Regulation 18746.1(b)(5)(A), the one-year ban does not apply. He may draft proposals and advise SJRRC on the procedural requirements, plans, or policies of CHSRA so long as he is not identified with SJRRC's efforts to influence CHSRA.

He may also assist SJRRC staff with responsibilities *not* related to CHSRA's activities such as: planning and implementing expansion of the conventional non-electric commuter ACE service between Stockton and San Jose; planning potential future conventional rail expansions of the ACE service to Sacramento, Merced and as far south as Bakersfield; and planning and coordinating for potential extensions of ACE service to Union City and to San Francisco.

In addition, Mr. Leavitt may *not* appear before or communicate with the CHSRA regarding the issuance, amendment, or awarding of *any contracts, permits, licenses or grants or sales or purchase of goods or property* for a period of one year after he leaves state service.³

This includes new or amended contracts that SJRRC may have with CHSRA to provide local funding for environmental work on sections of the high speed rail system.

³ However, he may appear before or communicate with the CHSRA for the purpose of administering, implementing, or fulfilling the requirements of a pre-existing contract or project, so long as the services do not involve the issuance, amendment, awarding, or revocation of a permit, license, agreement or contract, or the sale or purchase of goods or property. (Regulation 18746.1(b)(5)(A); *Quiring* Advice Letter, No. A-03-272; *Hanan* Advice Letter, No. I-00-209.)

The Permanent Ban

The permanent ban is a lifetime ban and applies to any judicial, quasi-judicial, or other proceeding in which Mr. Leavitt participated while a state administrative official at the CHSRA or any other state agency. (Sections 87401 and 87402.) Thus, a public official may never “switch sides” in a proceeding after leaving state service.

Sections 87401 and 87402 provide:

“No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial, quasi-judicial or other proceeding if both of the following apply:

(a) The State of California is a party or has a direct and substantial interest.

(b) The proceeding is one in which the former state administrative official participated.” (Section 87401.)

“No former state administrative official, after the termination of his or her employment or term of office shall for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding in which the official would be prohibited from appearing under Section 87401.” (Section 87402.)

Section 87400 (b) defines state administrative official as: “. . . every member, officer, employee or consultant of a state administrative agency who as part of his or her official responsibilities engages in any judicial, quasi-judicial or other proceeding in other than a purely clerical, secretarial or ministerial capacity.”

Section 87400(c) defines “judicial, quasi-judicial or other proceeding” to include: “. . . any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or *other particular matter involving a specific party or parties* in any court or state administrative agency, including but not limited to any proceeding governed by Chapter 5 (commencing with Section 11500) of Division 3 of Title 2 of the Government Code.” (Emphasis added.)

As the Deputy Director of CHSRA, Mr. Leavitt is a state administrative official for purposes of the Act. Therefore he is subject to the permanent ban once he leaves state service. (Section 87400(b).) To determine if the permanent ban applies to his situation, he would need to identify the proceedings in which he participated while employed by the state, if any.

“Participated” means to have taken part personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information as an officer or employee, but excluding approval, disapproval or rendering legal advisory opinions to departmental or agency staff that do not involve a specific party or parties. (Section 87400(d).)

As Deputy Director of CHSRA, Mr. Leavitt held a high-level administrative and supervisory position. Among his decisionmaking responsibilities, he reviewed, commented on and made decisions to approve or disapprove various environmental documents, including Environmental Assessments, draft and final Environmental Impact Reports/Environmental Impact Statements and certification documents as part of CHSRA’s oversight of the state’s high speed rail project.

In the past, we have advised that preparing an EIR is a particular matter involving a specific party or parties before a state administrative agency and involves a contract between the party or parties and the state administrative agency. Thus, any proceeding related to an EIR is a “judicial, quasi-judicial, or other proceeding” to which the permanent ban will apply if Mr. Leavitt previously participated in the proceeding. (See *Walter* Advice Letter, No. I-06-078 and *Cooper* Advice Letter, No. A-99-094.)

In light of his involvement in particular CHSRA projects (including the 10 EIR/EIS processes: Sacramento-Merced, San Francisco-San Jose, San Jose-Merced, Merced-Fresno, Fresno-Bakersfield, Bakersfield-Palmdale, Palmdale-Los Angeles, Los Angeles-Orange County, Los Angeles to San Diego, and the Altamont Corridor Rail Project) that involved specific parties, Mr. Leavitt may not represent another party on these and other projects in which he participated while employed by CHSRA. (See Regulation 18741.1(a)(4).)

Influencing Prospective Employment:

The ban on influencing prospective employment prohibits any public official from making, participating in making, or influencing a governmental decision that directly relates to a prospective employer while negotiating or after reaching an employment arrangement. (Section 87407; Regulation 18747.) This law expands the Act’s conflict-of-interest rules and related disqualification obligations to situations where a decision will have a reasonably foreseeable material financial effect on the prospective employer even though the official does not yet have an economic interest in the employer.

Section 87407, the ban against influencing prospective employment, provides: “No public official, shall make, participate in making, or use his or her official position to influence, any governmental decision directly relating to any person with whom he or she is negotiating, or has any arrangement concerning, prospective employment.”

The term “public official” is defined, in part, in Section 82048 as “. . . every member, officer, employee or consultant of a state or local government agency. . .” CHSRA is a state government agency, and as an employee working for CHSRA, Mr. Leavitt is subject to this ban.

“A public official is ‘negotiating’ employment when he or she interviews or discusses an offer of employment with an [potential] employer or his or her agent.” (Regulation 18747(c)(1).) The Commission has construed the scheduling, conduct, and follow-up to an interview as one continuous process falling under the definition of “negotiating” employment. (*Bonner* Advice Letter, No. I-98-287.) However, the mere act of sending a resume or application to a specific entity has not been considered “negotiating.” Similarly, entertaining informal inquiries about future plans and receiving expressions of general interest in discussing potential employment opportunities at some point in the future is not considered “negotiating.” (*Id.*)

“A public official has an ‘arrangement’ concerning prospective employment when he or she accepts an employer’s offer of employment.” (Regulation 18747(c)(2).)

You state that Mr. Leavitt has given notice to CHSRA that he is negotiating employment as a consultant with SJRRC. If he has sufficiently discussed the prospect of his future employment with SJRRC to be considered part of a “negotiation,” he would be prohibited, pursuant to Section 87407, from making, participating in the making, or using his official position with CHSRA to influence any governmental decisions with a reasonably foreseeable material financial effect on SJRRC.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Emelyn Rodriguez
Commission Counsel

ER:jgl